

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

ORDER

SB CIVIL WRIT PETITION NO.1649/2002
Dr.Rajendra Surekha V/s State of Rajasthan & ors.

Date of Order : :

August, 2006

PRESENT
HON'BLE MR. JUSTICE P.S. ASOPA

Mr.Ashok Gaur, for the petitioner.
Mr.S.N. Kumawat, for the RPSC.
Mr.R.C. Joshi,
Mr.Reasham Bhargava, for the respondents.
Mr.Harshvardhan Nandwana, Dy. GA, for the State.

By the instant writ petition, the petitioner has initially challenged the selection of respondent No.3 & 4 (Dr.Sudhir Mehta & Dr.Rajiv Bagarhatta) against the vacancies of the year 1990-91 for the post of Lecturer in General Medicine and to direct the respondent Rajasthan Public Service Commission to accordingly amend the result of the selection of the year 1990-91. The petitioner has further sought consequential direction of appointment to the said post against the year 1990-1991 with seniority.

2. The facts in brief of the case are that the petitioner has filed the present writ petition initially challenging the eligibility of Dr.Sudhir

Mehta and Dr.Rajiv Bagarhatta (respondent No. 3 & 4 in the original writ petition) on the ground that these two private respondents were not eligible for appointment against the vacancies of the year 1990-91 to the post of Lecturer (General Medicine) on account of not completing the post graduation degree i.e. M.D. in General Medicine upto 1.4.1990. Subsequently, an application was filed on 8.5.2006 for deleting the names of Dr.Rajiv Bagarhatta – respondent No.4, Dr.S.K. Sharma – respondent No.5 and Dr.Shiv Charan Jelja – respondent No.6 and the same was allowed on 11st May, 2006 along with another application of adding Dr.Prakash Keswani as party. Presently, the grievance of the petitioner is confined to Dr.Sudhir Mehta – respondent No.3 of the writ petition. Dr.Sudhir Bhandari, who was originally respondent No.7 is now respondent No.4 and Dr.Prakash Keshwani is respondent No.5

3. It is stated in the present writ petition that the writ petition No.5424/1990 filed by the petitioner apprehending the termination while working as adhoc temporary Lecturer in General Medicine and for claiming regularisation was decided along with connected writ petition No. 5425/1990 of Dr.Sudhir Bhandari on 11.4.1994, was dismissed so far as claim of the petitioner to be treated as substantive appointee is concerned. However, termination of the petitioner was declared illegal.

The operative portion of the said judgment dated 11.4.1994 is as under:-

"In the result the writ petitions are dismissed so far as claim of the petitioners to be treated as substantive appointees is concerned.. However, termination of the petitioner is declared illegal. The petitioner shall be allowed to continue in service till the availability of the candidates selected by the Rajasthan Public Service Commission. The Commission is directed to interview the petitioners and other ad hoc appointees who have completed three years or more of service without requiring them to appear in the screening test. While interviewing them along with other candidates the Commission shall take into consideration their performance and service record. The respondent Government is directed to positively make yearwise determination of vacancies under Rule 8A of the Rajasthan Medical Service (Collegiate Branch) Rules and send requisition for various posts under these rules on yearly basis. The Commission must also make yearwise selection as far as possible. Costs made easy."

4. Against the said judgment in both the cases, the Rajasthan Public Service Commission (for Short 'the RPSC') filed special appeals, which were registered as DB civil special appeal Nos.492/94 & 533/94. The said special appeals were disposed of on 8th May, 1995 without there being any order of cost and the directions issued by learned Single

Judge were sustained with following modifications. The relevant portion of the said judgment dated 8th May, 1995 is as follows:-

"After hearing the learned counsel for the parties and after careful perusal of the impugned order passed by the learned Single Judge, we are of the opinion that the direction issued by the learned Single Judge deserves to be sustained with following modification :

The Rajasthan Public Service Commission is directed to interview the respondents-petitioners, namely, Dr. Rajendra Kumar Surekha and Dr. Sudhir Bhandari only, against the vacancies of the year 1990-91 on the basis of their performance and service record relating to their past service as Lecturers in the department of Medicine, and declare the results within a period of one month from the date of production of certified copy of the judgment of this Court. Their consideration should not be clubbed with open market candidates, for the reasons which have been enumerated by the learned Single Judge and have been affirmed by us. The appellant, Rajasthan Public Service Commission should start the process of selection for the vacancies of subsequent year i.e. 1991-92, 1992-93 and 1993-94 only after interviewing the respondents-petitioners against the vacancies of 1991. We further direct that in case the respondents petitioners are selected against the vacancies of 1991 on the basis of their past performance and service record, they would also be entitled to the benefit of seniority at least with effect from 1st April, 1990,

on which date two posts of Lecturers in Medicine were available."

5. Against the said judgment, the RPSC filed a SLP and in the SLP, Supreme Court passed the order on 5.6.1995. The relevant portion of said order dated 5.6.1995 of Supreme Court is as follows:-

"We have heard learned counsel for the appellant and respondents Nos.1 and 2. In so far as the direction given by the High Court dispensing with the requirement regarding screening test in respect of respondents Nos.1 and 2 and other adhoc appointees who have rendered service for three years or more, in the facts and circumstances of the present case, we do not consider it appropriate to interfere with the direction given by the High Court. We are, however, of the view that in the matter of selection for the two vacancies for the post of Lecturers in Medicine for the year 1990-1991, the appellant - Rajasthan Public Service Commission may consider the respondents Nos. 1 and 2 along with other applicants who are found eligible for appointment to the vacancies of the year 1990-1991 and who have submitted their applications.

While considering, the Commission will take into account the performance and service record of the applicants who are in government service. Time for consideration is extended by four weeks. In the event of the respondents Nos. 1 and 2 being

selected, their seniority will have to be decided by the appropriate authority in accordance with the relevant provisions of the Rules.

The appeals were disposed of accordingly."

6. After the judgment of learned Single Judge dated 11.4.1994, an advertisement was issued by the RPSC on 23.8.1994 for 12 posts of Lecturer (General Medicine). In paragraph 6, it has been mentioned that required qualification and experience should be attained till the last date of application and last date of application mentioned was 7.10.1994. During the pendency of special appeal before the Division Bench, some exercise of yearwise vacancy was undertaken by the Government and it was admitted that there are 2 vacancies of the year 1990-91. It is stated in the writ petition that subsequently, said 12 number of posts was increased to 22 posts and there was consequential increase of 2 vacancies for the year 1991. Thus, in all the vacancies for the year 1990-91 became 4.

7. The further case of the petitioner is that as per Rule 8A, 9, 12 read with Rule 24 A of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962 (hereinafter to be referred as the Rules of 1962), the respondent Government and the RPSC are bound to determine the

vacancies yearwise for direct recruitment and further make selection yearwise by taking the date of eligibility as 1st of April of the respective year of vacancy.

8. During the pendency of the writ petition, petitioner filed an application for deletion of name of some of the respondents, which was allowed, as indicated above. The petitioner further confined his grievance to the ineligibility of Dr.Sudhir Mehta on account of completion of M.D. course after 1.4.1990, on 23.1.1991. It is further submitted that Dr.Rajiv Bagarhatta, who was placed in the reserve list was also selected for the post of Lecturer (Cardiology) and he had joined on the said post, therefore, name of the petitioner will automatically be placed in the reserve list, being next available candidate. In case of appointment of Dr.Sudhir Mehta, who was one of the selected and appointed candidate against four vacancies is quashed then the petitioner would be entitled to be placed in the merit list at No.3, above the reserve category candidate.

9. The respondent No.1 State as well as the RPSC and present contesting private respondents filed separate reply / counter affidavit to the writ petition. On merit of case, in their reply, they have denied that there was any binding observation / finding of the Apex Court for

taking the date of eligibility as 1.4.1990. It is further stated in reply that for direct recruitment, no date of eligibility is prescribed in the Rules of 1962. They have also stated that the eligibility as per Clause 6 of the advertisement dated 23.8.1994 was to be seen as on last date of application which has been mentioned as 7.10.1994 in border line box. They have also stated that none of the Rule referred by the petitioner make it obligatory to take 1st of April of the respective year of vacancy as the date of eligibility. Counsel for the RPSC has also submitted that on 7.8.1998, the Supreme Court in SLP of **Rajasthan Public Service Commission V/s Deepak Verma and anr.** held that direction contained in the order dated June 5, 1995 in Civil Appeals arising out of special leave petitions Nos.12740-41/95 filed by RPSC against the Division Bench judgment were given in the facts and circumstances of those cases only and the said directions cannot be treated as laying down the law regarding selection for appointment by the Rajasthan Public Service Commission which has to be made in accordance with the relevant rules, therefore, said order of Supreme Court dated 5th June, 1995 delivered in case of petitioner and Dr.Sudhir Bhandari cannot be treated as laying down the law regarding selection for appointment by the RPSC for any other subsequent year of same case or other cases.

The relevant part of order dated 7.8.1998 passed in the case of RPSC

V/s Deepak Verma & anr. is as follows:-

“Having regard to the fact that the respondents have already been considered and selected for appointment on the post of Assistant Professor in respective specialities and they have also been appointed, we do not consider it a fit case to go into the question that has been raised by the petitioner in these special leave petitions. We, however, clarified that the directions contained in order dated June 5, 1995 in Civil Appeals arising out of Special Leave Petitions Nos. 127740/41/95 were given in the facts and circumstances of those cases only and the said directions cannot be treated as laying down the law regarding selection for appointment by the Rajasthan Public Service Commission which has to be made in accordance with the relevant rules.”
(emphasis supplied)

10. The private respondent No.3 Dr.Sudhir Mehta has also raised two preliminary objection in reply, one is regarding delay and another is of estoppel.

11. Dr.Prakash Keshwani – respondent No.5 has taken the objection in counter affidavit that in case there was any binding observation and finding then the petitioner ought to have filed contempt petition instead of approaching the Court again by filing the present writ petition and re-agitating the same, which is barred by the principle of res judicata. He

has also supported the aforesaid objections of delay and estoppel.

12. The submission of counsel for the petitioner Mr.Ashok Gaur is that the RPSC has acted illegally in allowing Dr.Sudhir Mehta, who was ineligible on account of completion of post graduation degree after the date of eligibility i.e. 1.4.1990 which has been observed by the Supreme Court and aforesaid Benches. Further submissions of Mr.Gaur is that as per Scheme of the Rules of 1962 more particularly Rule 2 (m), 8 A & 24 A, 1st of April of the year of vacancy is to be taken as the date of eligibility and thus, Dr. Sudhir Mehta was not eligible to be called for interview for the vacancies of the year 1990-91. Mr.Gaur also submitted that the said fact came to the knowledge of petitioner when the appeal against the judgment of Single Bench of the subsequent litigation was going on wherein direction for provisional appointment was issued and the same was given on provisional basis subject to decision of Division Bench wherein he was allowed to intervene and present controversy was raised by him, which was decided on 1.10.1999, but no adjudication was made on the aforesaid controversy, therefore, there was no question of any delay. Mr. Gaur further submits that issue of Dr.Sudhir Mehta's eligibility was not the subject matter of earlier writ petition and the cause of action arose to him after the

judgment of Supreme Court when Dr.Sudhir Mehta was called for interview and placed in the select list which was filed before the Division Bench and material was collected. Thus, the petition is not barred by principle of res judicata / estoppel.

13. In support of the aforesaid contention, Mr.Gaur has placed reliance of the earlier writ petition No.5434/1990 decided on 11.4.1994. Subsequently, the directions issued by learned Single Judge were modified by the Division Bench vide judgment dated 8th May, 1995. In an appeal filed by the RPSC, on 23.3.1995 , Supreme Court has further directed that not only the respondent No.1 & 2 of the special appeal, but other eligible candidates who were found eligible for appointment for the vacancies of the year 1990-91 will also be considered.

14. The ultimate submission of Mr.Gaur is that Supreme Court modified the direction of consideration of petitioner and Dr. Sudhri Bhandari by allowing the other eligible candidates, therefore, the date of eligibility was to be taken as 1.4.1990 as per modified direction of the Supreme Court. Mr.Gaur on the issue of eligibility has further placed reliance on two judgments of this Court reported in **1978 WLC (UC) 383 – MP Agarwal V/s State of Rajasthan & anr., 1979 WLC (UC) 421 – H.K. Hingarani V/s State of Rajasthan & Ors.** as also

two more judgments of Supreme Court reported in **2001 (2) SCC 480 – Palitra Mohan Das & Ors. V/s State of Orrisa & Ors. & 2006 (2) SCC 315 – Mohd. Sartaj & anr. V/s State of U.P. & Ors..**

15. The submission of Shri S.N. Kumawat, counsel for the RPSC is that none of the aforesaid judgment and in the Rules, the date of eligibility has been mentioned as 1st of April of the respective year in which vacancy has arisen. As per their advertisement, the date of eligibility was 7.10.1994, but when the direction was given to interview the persons separately for the vacancies of the year 1990-91, they have to evolve a reasonable criteria for calling the persons for interview, so in absence of specific direction and specific provision in the Rules of 1962 and in order to comply with the direction, they have decided to call the persons, who have completed post graduation till 31.3.1991 and the said date is inner limit of the last date fixed by them. Therefore, they have taken 31.3.1991 as the date of eligibility for interview against the year 1990-91 which is neither contrary to the direction of the Hon'ble Supreme Court nor to the Rules of 1962.

16. It has also been submitted by counsel for the RPSC that this Court under Article 226 of the Constitution of India cannot sit as an appellate body on a decision of expert body and unless the cut off date is

arbitrary, same cannot be struck down. He has also submitted that the candidate cannot be allowed to challenge the procedure after remaining unsuccessful. On the aforesaid issue, counsel for the RPSC placed reliance on the judgments reported in **2000 (1) RLR 577 – Pratap Singh V/s High Court of Judicature for Rajasthan through its Registrar**, **2000 (2) SCC 615 – Suneeta Agarwal V/s State of Haryana & Ors.**, **2003 WLC (UC) 116 para 14**, **2003 (9) SCC 401 – Vijay Sayal & anr. V/s State of Punjab & Ors.**, **2003 (11) SCC 584 para 14 – Ashwani Kumar Singh V/s U.P. Public Service Commission & Ors.**, **2005 (2) WLC 358 – Emarata Ram Pooniya & Ors. V/s State of Rajasthan.** Counsel for the RPSC has also placed reliance on an unreported judgment dated 8th February, 1995 of Supreme Court in **Civil Appeal No.52/1993 - RPSC V/s Anand Kanwar & Ors.** on the issue that settled preposition of law is that eligibility of a candidate is to be determined on the basis of terms and conditions of the advertisement in response to which the candidate applied.

17. The counsel for State has also raised same submissions as raised by the counsel for the RPSC.

18. The counsel for the private respondents Mr.R.C. Joshi and

Mr. Resham Bhargava while supporting the submissions of the RPSC have further submitted that the writ petition is liable to be thrown out on the ground of delay and laches. The appointments made in the year 1996 cannot be allowed to challenge in the year 2000 and that too when the petitioner himself appeared in the interview of the same selection.

19. Mr. R.C. Joshi, counsel for Dr. Sudhir Mehta placed reliance on the judgments reported in **1977 (2) SLR 289 – P. Chitharanja Menon & Ors. V/s A. Balakrishnan & Ors., 2003 (5) SCC 669 para 38 – Government of Maharashtra & ors. V/s Deokar's Distillery**, on the issue that in case main order is not challenged then it is not open for the respondents to challenge the consequential order and delay is fatal and on the issue of yearwise direct recruitment placed reliance on the judgment of Division Bench of this Court reported in **1991 (1) RLR 727 – Rajasthan Council of Diploma Engineers v/s State of Rajasthan & anr.**

20. Counsel for the impleaded respondent Mr. Resham Bhargava assailed the conduct of the petitioner and further raised the objection that the present writ petition is hit by principle of res judicata. He has also supported the other objections of delay and laches and estoppel as well as submission on merits made by other respondents. In support of

his contention, Mr.Bharagava on the issue of res judicata placed reliance on the judgment reported in **1977 (2) SCC 355 para 2, 7 & 12, 1990 (2) SCC 715 para 35 & 47 (K) and 2005 (13) SCC 617 para 4, 9, 10, 11, 12**, on the issue of taking eligibility of earlier years in which the vacancy has arisen **1994 (2) SCC 630 – J.K. P.S.C. V/s Narendra Mohan, 1999 (1) WLC 542, 1994 (Supp-2) SCC 226, 1994 (2) SCC 630, 1999 (1) WLC 542 – Luni Jogesh V/s State, 1999 WLC (UC) 218 – Roop Kumari V/s State** and on the issue of advertisement stipulating last date of submitting application **1993 (Supp-3) SCC 168 – Rekha Chaturvedi V/s UOR, 1994 (2) SCC 723 – U.P.S.C. V/s Alpana, 1995 (Supp-4) SCC 706 – Harpal Kaur V/s Director, 1995 (2) WLC 58 – Yogesh Choudhary V/s RPSC, 1996 (1) WLC 212 – Sudhir Jiwan V/s RPSC, 1997 (4) SCC 18 – Ashok Kumar V/s Chander Shekhar, 1997 (6) SCC 574 - State of Rajasthan V/s Hitendra Kumar, 1998 (8) SCC 399 – State of Haryana V/s Anurag, 1999 (2) SCC 193 – Utkal University V/s Nru Singha Charan, and 2000 (2) WLC 223 – Ghanshyam Nagar V/s State.**

21. In view of aforesaid submissions, the dispute on merit is whether 1.4.1990 was required to be taken as the date of eligibility or 31.3.1991 taken by the RPSC is the date of eligibility to call the candidate for

interview against the year 1990-91 is correct or not and not the dispute whether the date of eligibility is the last date of application. Law is well settled on the issue that in case no date of eligibility is prescribed in the Rules then the date of eligibility would be last date of application, therefore, catena of judgments on the aforesaid issue of last date of application will be date of eligibility are not of much consequence.

22. On the basis of pleadings of the parties, submissions made by counsel for both the parties and the subsequent orders passed by this Court, following questions emerge for consideration :-

1. Whether the present petition suffers from delay and latches?
2. Whether the petitioner is estopped from challenging the eligibility of other candidates in the facts and circumstances when he himself had appeared as a candidate against the vacancies of 1990-91 and remained unsuccessful?
3. Whether as per direction of Apex Court as well as of Division Bench which has modified the direction of the Single Bench, it was incumbent on the part of the respondents to call only the candidates against the year 1990-91 who have completed post graduation degree upto 1.4.1990?
4. Whether as per scheme of the Rules of 1962, 1st of April of the

year of vacancy is relevant date for deciding the eligibility even if vacancy of earlier year and subsequent year are clubbed and further advertised together?

5. Whether the action of the RPSC in fixing 31.3.1991 as the date of eligibility for the candidates to be called for interview for the vacancies of the year 1990-91 is legal?
6. Whether clubbing of vacancies is permissible in case of direct recruitment where usually date of eligibility is the last date of application?

23. I have gone through the record of the writ petition and considered rival submissions of the parties.

24. The operative part of the judgment dated 11.4.1994 of Single Judge in SB civil writ petition No.5424/1999 filed by the petitioner was modified by the Division Bench vide judgment dated 8th May, 1995 in special appeal Nos.492/94 and 533/94 filed by the RPSC.

25. The directions contained in decision dated 11.4.1994 in SB civil writ petition Nos. 5424/1990 & 5425/1990 for sake of convenience to decide present dispute, are numbered as follows:-

1. The petitioner shall be allowed to continue in service till the availability of the candidates selected by the Rajasthan Public

Service Commission.

2. The Commission is directed to interview the petitioners and other ad hoc appointees who have completed three years or more of service without requiring them to appear in the screening test.
3. While interviewing them along with other candidates the Commission shall take into consideration their performance and service record.
4. The respondent Government is directed to positively make yearwise determination of vacancies under Rule 8A of the Rajasthan Medical Service (Collegiate Branch) Rules and send requisition for various posts under these Rules on yearly basis.
5. The Commission must also make yearwise selection as far as possible.

26. Against the said judgment in both the cases, the Rajasthan Public Service Commission filed DB civil special appeal Nos.492/94 & 533/94. The said special appeals were disposed of on 8th May, 1995 without there being any order of cost and the directions issued by learned Single Judge were sustained with modifications. The aforesaid modified directions, for sake of convenience to decide the present dispute, are numbered as follows:-

1. The Rajasthan Public Service Commission is directed to interview the respondents-petitioners, namely, Dr. Rajendra Kumar Surekha and Dr.Sudhir Bhandari only, against the vacancies of the year 1990-91 on the basis of their performance and service record relating to their past service as Lecturers in the

Department of Medicine, and declare the results within a period of one month from the date of production of certified copy of the judgment of this Court.

2. Their consideration should not be clubbed with open market candidates, for the reasons which have been enumerated by the learned Single Judge and have been affirmed by us.
3. The appellant, Rajasthan Public Service Commission should start the process of selection for the vacancies of subsequent year i.e. 1991-92, 1992-93 and 1993-94 only after interviewing the respondents-petitioners against the vacancies of 1991.
4. We further direct that in case the respondents – petitioners are selected against the vacancies of 1991 on the basis of their past performance and service record, they would also be entitled to the benefit of seniority at least with effect from 1st April, 1990, on which date two posts of Lecturers in Medicine were available.”

27. Against the said judgment of Division Bench, SLP Nos.12740-12741/95 were filed by the RPSC. The directions given by Supreme Court in the said SLP on 5.6.1995 are, for sake of convenience to decide the present dispute, numbered as follows:-

1. In so far as the direction given by the High Court dispensing with the requirement regarding screening test in respect of respondents Nos.1 and 2 and other adhoc appointees who have rendered service for three years or more, in the facts and circumstances of the present case, we do not consider it appropriate to interfere with the direction given by the High Court.
2. We are, however, of the view that in the matter of selection for the two vacancies for the post of Lecturers in Medicine for the year 1990-1991, the appellant – Rajasthan Public Service Commission may consider the respondents Nos. 1 and 2 along with other applicants who are found eligible for appointment to

the vacancies of the year 1990-1991 and who have submitted their applications.

3. While considering, the Commission will take into account the performance and service record of the applicants who are in government service.
4. In the event of the respondents Nos. 1 and 2 being selected, their seniority will have to be decided by the appropriate authority in accordance with the relevant provisions of the Rules.

28. Thus, the directions of the Division Bench of screening and consideration of past service of the petitioner and Dr.Sudhir Bhandari for the year 1990-91 stand extended for other eligible candidates and the same stands partially modified. On the issue of seniority also direction was modified and it was ordered to be granted in accordance with the rules. Thus, the RPSC was finally bound by the aforesaid four directions issued by the Supreme Court wherein there is no direction for taking eligibility as 1.4.1990 against the year 1990-91.

29. It would be worthwhile to quote certain relevant rule of the Rajasthan Medical Service (Collegiate Branch) Rules, 1962. Rule 6 (3) relating to composition and strength of service, Rule 7 (a) of recruitment, Rule 8 A of determination of vacancies, Rule 9, 12, 13, 14, 19, 20 for direct recruitment, 24 A (2) & 24 A(11-A) of Procedure for promotion:-

Part II – Constitution of Service

6. Composition and Strength of the Service.

(1).....

(2).....

(3) The strength of posts in each grade shall be such, as may be determined by Government, from time to time, provided that Government may-

(a) create any post, permanent or temporary, from time to time as may be found necessary, and

(b) **leave unfilled or hold in abeyance or abolish any post, permanent or temporary, from time to time without thereby entitling any person to any compensation**

PART II – METHODS OF RECRUITMENT

7. Recruitment - Recruitment to the Service after the commencement of these Rules shall be by the following methods:-

(a) Direct recruitment (in accordance with Part IV of these Rules.

8A. Determination of Vacancies :- (1) (a) **Subject to the provisions of these Rules, the Appointing Authority shall determine on 1st April every year, the actual number of vacancies occurring during the financial year.**

(b) Where as post is to be filled in by a single method as prescribed in the rule or Schedule, the vacancies so determined shall be filled in by that method.

(c) Where a post is to be filled in by more than one method as prescribed in the rules or Schedule, the Apportionment of vacancies, determined under clause (a) above, to each such method shall be done maintaining the prescribed proportion for the over – all number of posts already filled in. If any fraction of vacancies is left over, after apportionment of the vacancies in the manner prescribed above, the same shall be apportioned to

the quota of various methods prescribed in a continuous cyclic order giving precedence to the promotion quota.

(2) The Appointing Authority shall also determine the vacancies of earlier years, yearwise which were required to be filled in by promotion, if such vacancies were not determined and filled earlier in the year in which they were required to be filled in.

PART IV – Procedure for direct recruitment

9. Inviting of applications : Applications for direct recruitment to posts in the Service shall be invited by the Commission by advertising the vacancies to be filled, in the official Gazette and in such other manner, as may be deemed fit :

Provided that while selecting candidates for the vacancies so advertised, the Commission may, if intimation of additional requirement not exceeding 50% of the advertised vacancies, is received by them before the selection, also select suitable persons to meet such additional requirement.

12. Academic & Technical qualifications :- The candidate for direct recruitment to the posts specified in + + “Part A, B and C of Schedule I” shall possess such academic and technical qualifications and experience as is laid down, from time to time, by the Rajasthan University for the teaching staff in Medical Colleges.

@ “The candidates for direct recruitment to the post specified in schedule II shall possess the academic and technical qualifications and experience as laid down in column 6 of Schedule II.”

13. Application fee - A candidate for direct recruitment to a post in the Service must pay the fees fixed by the Commission.

14. Form of Application : The application shall be made in the form prescribed by the Commission and obtainable from the Secretary to the Commission on payment of such fee as the

Commission may from time to time, prescribe.

19. Scrutiny of applications - The Commission shall scrutinise the applications received by them and require as many candidates qualified for appointment under these Rules as seem to them desirable to appear before them for interview;

Provided that the decision of the Commission as to the eligibility or otherwise of a candidate, shall be final.

20. Recommendations of the Commission :- The Commission shall prepare a list of the candidates whom they consider suitable for appointment to the posts concerned arranged in the order of merit and forward the same to Government;

Provided that the Commission may to the extent of 50% of the advertised vacancies, keep names of suitable candidates on the reserve list. The names of such candidates may on requisition, be recommended in the order of merit to Government within 6 months from the date on which the original list is forwarded by the Commission to Government.

PART-V Procedure for Promotion

24 A. Revised Criteria, Eligibility and Procedure for promotion to Junior, Senior and other posts encadred in the Service :-

(1)

(2) The persons enumerated @ “in column 4 of Schedule I, column 5 of Schedule II as the case may be, shall be eligible for promotion to posts specified against them in Column 2 thereof to the extent indicated in Column 3 subject to their possessing **minimum qualifications and experience on the first day of the month of April of the year of selection** as specified in Column 6 or in the relevant Column regarding “minimum qualification and experience for promotion”, as the case may be.

Provided that for first promotion in the Service if number of persons substantively appointed and confirmed on the lowest post, equal to the number of vacancies, are not available then persons who have been appointed to the lowest post in the

Service after selection in accordance with one of the methods of recruitment prescribed under these Rules, shall also be eligible if they fulfil other conditions of eligibility.”

24 A(11-A) If in any subsequent year, after promulgation of these rules, vacancies relating to any earlier year are determined under sub-rule (2) of rule relating to determination of vacancies which were required to be filled by promotion, the Departmental Promotion Committee shall consider the cases of all such persons **who would have been eligible in the year to which the vacancies relate irrespective of the year in which the meeting of the Departmental Promotion Committee is held** and such promotions shall be governed by the criteria and procedure for promotion as was applicable in the particular year to which the vacancies relate, and the service/experience of an incumbent who has been so promoted, for promotion to higher post for any period during which he has not actually performed the duties of the post to which he would have been promoted, shall be counted. The pay of a person who has been so promoted shall be re-fixed at the pay which he would have derived at the time of his promotion but no arrears of pay shall be allowed to him.

1. Whether the present petition suffers from delay and latches?
30. The submission of counsel for the respondents is that presently the petitioner is confining his challenge to the appointment of Dr.Sudhir Mehta respondent No.3 against the vacancies of the year 1990-91 on the ground that he was not eligible and further seeking direction for his placement in the merit list as well as appointment against the vacancy of 1990-91 which is virtually part challenge to the appointment order issued on 6.3.1996 four years back by filing writ petition in the year

2000 without any reasonable explanation. Counsel for Dr.Sudhir Mehta has placed reliance on a judgment of Supreme Court in case of **P.Chitharanja Menon & Ors.** (supra) wherein basic order of promotion was not challenged and subsequent order of determining the date of commencement of service was challenged. The Supreme Court has declined to interfere on the ground of delay and laches.

31. Here in the instant case, the position is different. The petitioner was also given appointment by the same order dated 6.3.1996. Dr.Sudhir Mehta was placed at S.No.1 in the said appointment order, which appears to be against the vacancy of 1990-91 whereas petitioner's name appears at S.No.8, which appears to be against the vacancy of subsequent year. The said appointment was on provisional basis subject to decision of the special appeal, which was ultimately decided on 1.10.1999 wherein the petitioner was impleaded as intervener, but his plea was not entertained by the Division Bench. Thereafter, he has filed the present writ petition. Hence in the above facts and circumstances, the petition is not liable to be dismissed on the ground of delay and laches.

2. Whether the petitioner is estopped from challenging the eligibility of other candidates in the facts and circumstances

when he himself has appeared as a candidate against the vacancies of 1990-91 and remained unsuccessful?

32. Mr.S.N. Kumawat, counsel for the RPSC has placed reliance on four judgments reported in **2000 (2) SCC 615 – Suneeta Agarwal V/s State of Haryana & Ors.**, **2000 (1) RLR 577 – Pratap Singh V/s High Court of Judicature for Rajasthan through its Registrar**, **2003 (9) SCC 401 – Vijay Sayal & anr. V/s State of Punjab & Ors.** and **2005 (2) WLC 358 – Emarata Ram Pooniya & Ors. V/s State of Rjasthan.**

33. It is true that law is well settled on the issue of estoppel that once the candidate has taken a chance then he cannot challenge the selection process. But here in the instant case, selection process was not challenged, but the challenge was to the eligibility of private respondent No.3 on the ground that Apex Court judgment was not followed while calling the candidates for interview against the year 1990-91 and further whether the date of eligibility taken by the RPSC for calling the persons for interview against the year 1990-91 was in accordance with the Rules which as per petitioner is 1.4.1990. As per RPSC advertisement, the last date for submitting application was 7.10.1994, which is the date of eligibility also. The RPSC has not

disclosed the date of eligibility for the candidates to be called for interview for 1990-91 and it was ultimately disclosed to this Court on 27.7.2006 when the counsel was asked to take instructions on 20.7.2006 as 31.3.1991, therefore, in the above mentioned facts and circumstances, it was not possible for the petitioner to assail the said date of eligibility. Although, he is pursuing the matter for yearwise selection and according to him, date of eligibility is 1.4.1990. The judgments referred by counsel for the RPSC are not applicable on the facts. Thus, the principle of estoppel is not applicable and the said contention of the respondent is liable to be rejected.

3. Whether as per direction of Apex Court as well as of Division Bench which has modified the direction of the Single Bench, it was incumbent on the part of the respondents to call only the candidates against the year 1990-91 who have completed post graduation degree upto 1.4.1990?

34. The directions of the Division Bench of screening and consideration of past service of the petitioner and Dr.Sudhir Bhandari for the year 1990-91 were extended for other eligible candidates also, thus partially modified. On the issue of seniority also direction was modified and was ordered to be granted in accordance with the Rules.

Thus, the RPSC was finally bound by the aforesaid four directions issued by the Supreme Court.

35. I have carefully gone through the aforesaid three judgments and in none of the judgment either this Court or the Supreme Court had fixed 1.4.1990 as the date of eligibility for the year 1990-91. Since there was no direction for taking the eligibility as 1.4.1990 and further there was no rule in the Rules of 1962 for fixing the eligibility of 1st April of year when vacancies have arisen in case of direct recruitment. The RPSC was right in fixing the date of eligibility as the last date of submission of the form i.e. 7.10.1994 even for earlier years vacancies. The law on the issue of fixing the cut off date for eligibility is well settled and the same has to be taken either from the Rules and if no rule then the date mentioned in the advertisement will prevail.

36. Here in the instant case, the RPSC was faced with the situation that for one advertisement, two selections were held as per final direction of Supreme Court, therefore, to call the candidates for the vacancies of the year 1990-91, the RPSC was required to fix the date of eligibility, which was fixed as 31.3.1991, which is end of the financial year 1990-91. There is no illegality in fixing the said date.

4. Whether as per scheme of the Rules of 1962, 1st of April of the

year of vacancy is relevant date for deciding the eligibility even if vacancy of earlier year and subsequent year are clubbed and further advertised together?

37. The submission of Mr.Gaur is that the date of eligibility fixed in the case of promotion be also taken in case of direct recruitment.

38. In my view, direct recruitment and promotion are two different source of appointment and separate procedure is prescribed to make appointment by recruitment and promotion, therefore, the aforesaid contention is wholly untenable. In favour of person in service there exists a Rule 8A read with Rule 24A (2) and 24A(11-A) of the Rules of 1962 for determination of the earlier year vacancy and yearwise promotion for which 1st April of the respective year is date of eligibility, but in case of direct recruitment, no such rule exists. Therefore, the judgment of this Court reported in **1978 WLC (UC) 383 - M.P. Agarwal V/s State of Rajasthan & anr.** and **1979 WLC (UC) 421 - H.K. Hinorani V/s State of Rajasthan & Ors.** relating to promotion are of no help to the petitioner. The other two judgments of Supreme Court reported in **2001 (2) SCC 480 – Palitra Mohan Das & Ors. V/s State of Orrisa & Ors.** and **2006 (2) SCC 315 - Mohd. Sartaj & anr. V/s State of U.P. & Ors.** are also not relating to taking of eligibility of

the year when the vacancies arose.

39. The aforesaid issue has been raised before this Court as well as before the Supreme Court and all the Court are unanimous on the issue that year of vacancy has no relevancy for taking eligibility in case of direct recruitment. The last date for submission of application form mentioned in the advertisement is the relevant date for the purpose of eligibility. If the case of Dr. Sudhir Mehta is adjudged from this angle, there was no dispute that he was eligible on 7.10.1994 i.e. last date mentioned by the RPSC.

40. It would be useful to refer some of the decisions of this Court and Supreme Court cited by Mr.R.C. Joshi and Mr.Reasham Bhargava, counsel for private respondents on the issue that vacancies arisen in earlier year had nothing to do with eligibility. The same are **1991 (1) RLR 727 Rajasthan Council of Diploma Engineers V/s State of Rajasthan & anr. para 20 (1) & (2) and 21, 1994 (2) SCC 630 para 12 (J & K PSC V/s Dr.Narinder Mohan), 1994 (suppl-2) SCC 226 – Union of India & anr. V/s Yogendra Singh para 5, Civil Appeal No.52/1993 RPSC V/s Anand Kanwar – decided on 8th February, 1995, 1999 (1) WLC 542 – Kumari Luni Jogesh V/s State of Rajasthan & Ors. para 3, 4 & 7.**

41. The findings given in the judgment reported in **(1994) 2 SCC 630 & (1994) Suppl.2 SCC 226** have been followed by this Court by holding that merely because vacancies were not advertised or filled-up for last three years, the petitioner is not entitled for any relief in case she is not qualified as per the date mentioned in the advertisement in case reported in **1999 (1)WLC 542** (supra). The relevant paragraph No.3, 5, 6 & 7 of the aforesaid judgment are as follows:-

“3. The petitioner had passed the Secondary School Examination in the year 1995 and obtained the Certificate on 25.6.95. She passed the Teachers Training Course (Second Year) Examination in the year 1997, which is evident from the certificate dated 23.9.1997 filed by the petitioner as Annexure.2 to the petition. Thus, by no means the petitioner can say that she was eligible for the post of Teacher Grade III prior to the commencement of the amended Rules which came in operation w.e.f. 30.12.96. The advertisement was made on 15.6.98 and the petitioner become qualified, at the most, even under the Old Law on 23.9.97 and as such she cannot say that there was a much delay in filling up the vacancies after she possessed the requisite qualification, Teachers Training Certificate.

5. This issue was considered by the **Hon'ble Apex Court in Jammu & Kashmir Public Service Commission and others Versus Dr.Narendra Mohan and others, 1994 (2) SCC 630**, wherein the Apex

Court has observed as under-

"it is difficult to accept the contention of Shri Rao to adopt the chain system of recruitment by notifying each year's vacancies and for recruitment of the candidates found eligible for the respective years. It would be fraught with grave consequences. It is settled law that the Government need not immediately notify vacancies as soon as they arose. It is open, as early as possible, to inform the vacancies existing or anticipated to the PSC for recruitment and that every eligible person is entitled to apply for and to be considered of his claim for recruitment provided he satisfies the prescribed requisite qualifications. Pegging the recruitment in chain system would deprive all the eligible candidates as on date of inviting application for recruitment offending Articles 14 and 16."

6. Mr. Trivedi placed reliance upon a Division Bench judgment of the Court (Jaipur Bench) passed in D.B. Civil Special Appeal No.86\57.1997, Rajpal Singh and others Versus Director, Gramin Vikas and Panchayat Raj Department and others, decided on 13.5.98. In fact the aforesaid judgment does not deal with the issue involved herein. As explained above, it is not necessary to determine the year-wise vacancies and secondly, even if it is necessary, as per the law laid

down by the Hon'ble Supreme Court in **Union of India and another Versus Yogendra Singh, 1994 (Supp.) 2 SCC 226**, the applicant must possess the requisite qualification as per the advertisement even if the vacancies have arisen prior to the date of the advertisement. In the said judgment, the Hon'ble Apex Court has categorically held as under-

"No candidate who does not possess the currently prescribed qualification and he possess the qualification prescribed earlier, can be said to be qualified or have any vested right to appointment even against some earlier unfilled vacancies. Every candidate, who aspires to fill any vacancy, must possess the educational qualification that are then prescribed."

7. As the petitioner does not possess the requisite qualification as provided in the advertisement, no relief can be granted to her."

(emphasis supplied)

42. The relevant para 20 (1) & (2) of the case of **Rajasthan Council of Diploma Engineers V/s State of Rajasthan & anr.** (supra) are as follows :-

"20 (1) Rule 9 of the Rajasthan Service of Engineers (Building and Roads Branch) Rules, 1954 as amended vide notification No.F7(1) D.O.P. A-II/81 dated 21.12.81 with effect from

1.4.1981 is mandatory, but in view of the absence of an provision regarding unfilled vacancies of earlier years falling in direct recruitment quota, it cannot be applied for year-wise selections in case of direct recruitment with the same rigour as it is to be applied in the case of vacancies of earlier years in respect of promotion quota.

(2) The total exclusion of the candidates eligible at the time of holding direct recruitment against the unfilled vacancies of earlier years will be more vulnerable to Art. 14 and Art. 16 of the Constitution in comparison to restricting the direct recruitment to the candidates eligible in the earlier years against the vacancies of such years, yearwise."

5. Whether the action of the RPSC in fixing 31.3.1991 as the date of eligibility for the candidates to be called for interview for the vacancies of the year 1990-91 is legal?

43. The RPSC was directed to make the selection for 1990-91 separately, although, the vacancies of 1990-91 and subsequent years were clubbed and advertised through common advertisement according which, the last date fixed for receiving the form was 7.10.1994. To make the separate selection for 1990-91, the RPSC was, thus, required to fix some date of eligibility, which was neither specified by Supreme

Court nor the same is specified in the Rules of 1962, therefore, the RPSC rightly fixed 31.3.1991 as the date of eligibility for selection of the year 1990-91, which is end of financial year of 1990-91 and the same is in the inner limit of 7.10.1994. The RPSC is an expert body and it is entitled to take the decision when the judgments and rules are silent. In my view, the said decision taken by the RPSC is right and further this Court cannot sit as an Appellate Court on the decision of an expert body as held by this court in a judgment reported in **2003 WLC (UC) 116 para 14 – Dr.Rajesh Sharma &anr. V/s State of Rajasthan & Ors.** which is as follows:-

“Learned Single Judge has observed in para 4 of the impugned judgment and order that the advertisement in question contemplated the same educational qualifications as were prescribed under the rules and from various documents produced before the court, learned Single Judge has found that the degree of M.Sc. (Med.) Bio-Chemistry is a post graduate degree of recognised University but is not a post graduate degree in Veterinary Science or Animal Husbandry the eligibility for admission in M.Sc. (Med.) Bio-Chemistry is from different sources and it includes the qualification of B.V. Sc. and A.H. The advertisement did not require Post Graduate degree in Veterinary Science or Animal Husbandry and then the learned Single Judge says that since

M.Sc. (Med.) Bio-Chemistry is a degree of general nature, it cannot be considered to be post graduate degree in Veterinary Science and Animal Husbandry. We are of the opinion that it is not the domain of the Court to examine as to whether the degree of M.Sc. (Med.) Bio-chemistry could be treated as a post graduate degree in Veterinary Science or Animal Husbandry or not. It is the job of the expert body and a purely academic exercise, upon which the courts are always reluctant to embark and should not embark. Once the qualification held by the appellant for the purpose of appointment on the post in question had been examined at more than one stages by the expert body at the level of the RPSC as also at the level of the Government, as has been mentioned in the earlier part of this judgment and it had been found that the qualification held by the appellant could be treated as post graduate degree in Veterinary Science or Animal Husbandry and on that basis, after through examination of this issue at the level of the expert body, the appellant was consciously considered to be eligible and found suitable. **There was no scope for the learned Single Judge to sit as an appellant body over the decision of an expert body and to hold that the appellant did not possess the requisite qualification for the purpose of appointment in question."**

(emphasis supplied)

6. Whether clubbing of vacancies is permissible in case of direct recruitment where usually date of eligibility is the last date of application?

44. The submission of Mr.Gaur is that post of Lecturer is 100% by direct recruitment and clubbing of the vacancies of earlier year of direct recruitment quota is not permissible under the Rules of 1962. The said submission has been considered by the Single Bench, Division Bench and finally by the Supreme Court vide orders dated 11.4.1994, 8.5.1995 and 5.6.1995 respectively and the relief of exemption from screening and consideration of past record along with other eligible candidates was granted without specifying the date of eligibility and further the direction of seniority was modified to be granted as per Rules. But when the RPSC filed an appeal in case of Deepak Verma, the Supreme Court has declared on 7.8.1998 that directions contained in order dated June 5, 1995 in Civil Appeals arising out of the SLP Nos.12740-41/95 were given in the facts and circumstances of those cases only and the said directions cannot be treated as laying down the law regarding selection for appointment by the Rajasthan Public Service Commission which has to be made in accordance with the relevant rule which is reproduced in preceding

para, therefore, the decision dated 5.6.1995 given by the Supreme Court in case of petitioner and Dr.Bhandari will apply only against the vacancies of 1990-91 and not for any other years' vacancies or selection which has to be made in accordance with the rules.

45. Mr.Gaur further submits that even as per Rule 6 (3) read with Rule 8A, the vacancies are to be first determined and then a decision is to be taken for filling or keeping them unfilled, but that does not mean that the Government is allowed to act arbitrary. The submission of counsel for the State and the RPSC is that as per Rules of 1962, no direct recruitment is required to be made yearwise and even if the vacancies of earlier years are clubbed together and are advertised through common advertisement then also Rules are silent on the issue of eligibility.

46. The Division Bench of this Court in **Rajasthan Council of Diploma Engineer V/s State of Rajasthan & anr.** (supra) has considered the said aspect of the matter and held that it is for the Government to amend the rules. The said observations of the Division Bench are as follows:-

“21. Before parting with the case we may observe that in the facts of these cases we of course decline to interfere with the selection which has already been held, but we do feel that

the non-holding of the selection by any of the modes prescribed under the Rules for number of years is certainly a bad practice which cannot be approved and the same is deprecated. The apathy of the Government/Appointing Authority towards holding the yearwise selections according to the Rules causes a great hardship to the candidates desirous of seeking recruitment by promotion or by direct recruitment and we would like to leave a word of caution to the concerned authorities to see that such situation warranting uncalled for litigation is avoided in future particularly in case of direct recruitment for which there is no provision in the rules to take care of the vacancies of earlier years. **We do hope, expect and believe that the concerned authorities would act with all possible promptitude and make earnest efforts to see that the selections are held yearwise in future and in order to ensure the same even in the matter of direct recruitment, if necessary, appropriate amendment may be made in the Rules."**

(emphasis supplied)

47. In the judgment dated 8th May, 1995 of Division Bench in appeal filed by the RPSC against the decision dated 11.4.1994 of Single Bench in writ petition Nos.5424/90 & 5425/90, it was observed as under:-

"One of the important feature in the instant case is that if the argument of the counsel for the appellant is held to be tenable and the

direction issued by the learned Single Judge is held to be invalid, it would be highly improper and may ridiculous, inasmuch as many of the candidates from open market were not even eligible for selection in the year 1991. Similarly against the vacancies of 1991-92 and 1993-94 many may have become eligible at the time of inviting applications in the year 1994 by the R.P.S.C. **Not only this, since the respondents-petitioners have also been performing the duty of teaching also, many of the candidates whom the respondents-petitioners might have taught may have also become eligible for selection and the respondents-petitioners would be required to compete even with those students."**

(emphasis supplied)

48. The Supreme Court in **RPSC V/s Anand Kanwar** (supra) in its decision dated 8.2.1995, which relates to a teacher from Rajasthan where vacancies were clubbed and advertised for the years 1983 to 89, has also taken note of the fact that there was nothing on record that the Government was in any manner negligent or at fault in not making direct recruitment during the period 1983-89. The relevant portion of the judgment in Anand Kanwar (supra) is as follows:-

"It was not disputed before the High Court that prior to 1988, recruitment to the cadre of Assistant Teachers was made only in the year 1983. Recruitment to the said cadre is by way

of direct recruitment and also by promotion. During the period 1983-89 promotions were being made to the cadre, but no direct recruitment was made. The only contention raised by the respondent before the High Court was that it was mandatory for the Rajasthan Government to have filled the quota of direct recruits during all those years. It was further contended that had the posts meant for direct recruitment been advertised during the year 1983-89, the respondent could have applied and may have been selected. She contended that at that point of time, she could not be rejected on the ground of over-age. The High Court accepted the contentions on the following reasoning:-

"..... The last advertisement was issued in the year 1983 and this advertisement has been issued in the year 1989 that is after a lapse of about Six years and the petitioner has completed her age of 40 years in the year 1986. It has been held in this authority that if year-wise vacancies are not determined and if the advertisement are issued to fill up the vacancies of six years by the one advertisement, then the person's candidature cannot be rejected on that account....."

The competent authority cannot avoid this responsibility by sheer inaction or omission and failure on the part of the competent authority cannot be

used as a basis for denying eligibility to those who are eligible in a particular year but become ineligible on account of absence of determination of the vacancies....

.....She could have been denied right of a consideration only if there existed no vacancies till the time she has attained the age of 40 years. If vacancies were existing, she had a right of consideration and consequently the petitioner who has been allowed to appear in the interview under the orders of the Court, her result of the interview be declared and if she is found suitable for appointment on the basis of the merit that has been assigned to her by the Public Service Commission, she be afforded appointment as a Senior Teacher, which has not been designated as Lecturer in Secondary / Senior Secondary Section). The result be declared within a period of three weeks from today and if she is entitled to be appointed then appointment be accorded to her within 3 months from today."

We are of the view that the High Court fell into patent error bordering on perversity in issuing the mandamus on the reasoning quoted above. **It is settled proposition of law that the eligibility of a candidate has to be determined on the basis of the terms**

and conditions of the advertisement in response to which the candidate applies. There is nothing on the record to show that the State Government was in any manner negligent or at fault in not making the direct recruitment during the period 1983-89. Be that as it may, the High Court was not justified in taking the clock back to the period when unfilled vacancies were existing and holding that since the respondent was eligible on the date when vacancies fell vacant, she continues to be so till the time the vacancies are filled. Due to inaction on the part of the State Government in not filling the posts year-wise, the respondent cannot get a right to participate in the selection despite being over-aged."

(emphasis supplied)

49. As regard over age, in Rajasthan Direct Recruitment and Subordinate Service Rules, 1999, there is a Rule 12 (8) to the effect that in case recruitment is not held then the applicant is entitled for age relaxation, but there is no such rule in the Rules of 1962 and other rules. The Constitutional Bench of the Supreme Court in the case of **Shankaran Das v. Union of India** reported in (1991) 3 SCC 47 considered the issue of filling and unfilling of vacancies by Government even after preparation of the selection list, when selections were cancelled and held that the Government was under no

obligation to fill up all or any of the vacancies unless the relevant rules so indicated. Though the State is under no legal duty to fill up all or any of the vacancies, it does not mean that the State has a licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for proper reasons. The said finding of the Supreme Court is applicable in cases where there is no rule for making yearwise selection, but Rule 6 (3) read with Rule 8A of the Rules of 1962 make it obligatory on the Government to take the decision bonafidely and a reasoned one to keep the posts unfilled in particular year / years. Even in case, post is required to be filled by direct recruitment / promotion then also over-all prescribed ratio is to be maintained as per Rule 8A (c) of the Rules of 1962. The same position is in other service rules. The relevant para 7 of the said judgment is as follows:-

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. **Unless the relevant recruitment rules**

so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, *Neelima Shangla v. State of Haryana*, or *Jatendra Kumar v. State of Punjab*."

(emphasis supplied)

50. This position was reiterated in **All India SC & ST Employees Assn. v. A. Arthur Jeen - (2001) 6 SCC 380** and **Ludhiana Cental Coop. Bank Ltd. v. Amrik Singh - (2003) 10 SCC 136**.

51. In a case reported in **2003 (10) SCC 144**, the Supreme Court held that the Court cannot interfere with the policy decision of the Government for recruitment, unless it is arbitrary. In para 7 & 8, the aforesaid judgment of the Constitutional Bench has been followed. Relevant portion of para 7 & 8 are as under:-

“7. A Constitution Bench of this Court in **Shankarsan Dash V/s Union of India** held that candidates whose names appear in the merit list do not acquire indefeasible right of appointment if vacancies exist. The State is under no obligation to fill up all or any of the vacancies, unless the relevant recruitment rules so indicated. **Though, the State is under no legal duty to fill up all or any of the vacancies, it does not mean that the State has a licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for proper reasons. If vacancies or any of them are filled up, the State is bound to respect the comparative merit of candidates as reflected in the recruitment test and no discrimination can be permitted. This position was reiterated in All India SC & ST Employee’s Assn. v. A. Arthur Jeen and Ludhiana Central Coop. Bank Ltd. V. Amrik Singh.**

8. As was observed by this Court in Govt. of Orissa v. Haraprasad Das whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no jurisdiction to interfere with such decision of the Government and direct it to make further appointments.....”

(emphasis supplied)

52. The bonafide reasoned decision of not to fill the vacancies in a particular year / years will also be a check on inaction / administrative

lapse on the part of the Government machinery. In case an advertisement is not issued in same financial year in which vacancies has arisen and alternative arrangements made which continue for long time thereafter common advertisement is issued for vacancies of number of earlier years then the same will result in following serious consequences of jeopardising the career of the candidates :-

1. Ineligible candidate in a particular year will become eligible in subsequent year even for the earlier years' vacancies when they were ineligible.
2. Eligible candidate in a particular year will become ineligible in subsequent year on account of over age.
3. No advertisement for number of years will cause frustration in young talented eligible youths which will further demoralise them in case they rendered ineligible on account of delayed advertisement.
4. Persons promoted against direct recruitment vacancies will get undue advantage on account of non-advertisement for number of years.
5. Some time charge of the higher post is given to a person holding the lower post, although he is not eligible for

promotion to the higher post.

6. In case against the direct recruitment posts, adhoc appointments are made and advertisement is issued after a decade and an adhoc employee is not selected for any reason then he has to face termination and after termination he would not be eligible for any other direct recruitment post.

53. In view of the discussion hereinabove, the question No.6 is answered in the manner that in the selection made by the RPSC and consequential appointment by the Government, no illegality has been committed for the year 1990-91. Bonafide reasoned appropriate order is necessary under the present scheme of the Rules of 1962 or any other service rule for keeping the post unfilled in the same financial year / years and advertising together.

54. Though as per judgments of the Supreme Courts as well as Rules of 1962, the Government is not bound to make the yearwise direct recruitment and further there is no provision in the Rules to take 1st of April of the respective year of the vacancy as the date of eligibility, but still according to Rule 8A, the determination of vacancies of direct recruitment is also to be made on 1st April of the financial year which clearly reveals the intention of rule making

Authority to initiate the process of direct recruitment in time during same financial year and further as per Rule 6(3) of the Rules of 1962, the Government is required to take a bonafide and reasoned decision for filling or keeping the post unfilled in a particular year / years in same financial year, but some times without taking the said decision, vacancies remain unfilled by sheer inaction / administrative lapse / negligence.

55. Despite aforesaid judgments of this Court and Constitutional Bench / other judgments of Supreme Court, there exists no guideline for exercise of the said power, for keeping the post unfilled in particular financial year / years, therefore, a copy of this judgment be sent to the Chief Secretary for considering above aspect of the matter and for passing appropriate orders within reasonable time.

56. With the above observations, the writ petition is dismissed without there being any order as to costs.

(P.S. ASOPA) J.

ummed/-